

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of

IP-Enabled Services  
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WC Docket No. 04-36

**COMMENTS OF**  
**THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES ("TCCFUI")**

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Clarence A. West  
1201 Rio Grande  
Suite 200  
Austin, Texas 78701  
(512) 499-8838

Attorney for TCCFUI

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## **I. VOIP AS VIEWED BY THE TEXAS PUBLIC UTILITY COMMISSION**

In the Public Utility Commission of Texas's ("PUCT") Final Order in Docket No. 26412 (*Order Adopting Amendments To §26.465*, Approved Feb. 1, 2003, filed March 6, 2003, 14-16), the PUCT preamble discusses how the provisioning of local exchange telephone service ("LETS") [as defined under Texas law<sup>1</sup>] via Voice Over Internet Protocol ("VoIP") would constitute an "access line"<sup>2</sup> for purposes of rights-of-way compensation to local governments (PUCT Order at 14). The PUCT bases its determination of what constitutes an "access line" on whether or not a service meets the eight requirements of basic local telecommunication service ("BLTS"), as defined under Texas law.<sup>3</sup> VoIP as Plain Old Telephone Service ("POTS") must meet the BLTS criteria in Texas to be certified by the PUCT to provide local exchange services

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The PUCT stated: "So, to clarify its [PUCT] previous decisions ... the commission [PUCT] finds that POTS lines are access lines, because [PUCT] regulation ensures that POTS meets the eight requirements of BLTS..." (PUCT Order at 16).

## **II. VOIP ISSUES IN TEXAS**

On August 7, 2003, Time Warner Cable Information Services (Texas), LP, d/b/a Time Warner Cable ("Time Warner") filed an application ("Application") under § 54 151 of the Public

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<sup>1</sup> Texas Utility Code, Sec. 51.002 (5) (Supp. 2004), LETS is a "telecommunication service" under the Texas statutory definition.

<sup>2</sup> In Texas municipalities are compensated for use of their rights-of-ways by Certificated [Local Exchange] Telecommunication Providers ("CTP"), pursuant to Chapter 283 of the Texas Local Gov. Code, as set forth in PUCT Rules 26.461-26.468 based upon the number of "access lines" (a defined term, somewhat akin to a dial tone for "switched lines" [circuit or packet], but also including private line data connection termination points).

<sup>3</sup> Texas Utility Code, Sec. 51.002 (1) (Supp. 2004).

Utility Regulatory Act, TEX. UTIL. CODE ANN. (Vernon 1998 & Supp. 2004) (“PURA”) for PUCT approval to provide facilities-based **“local exchange service”** within the entire State of Texas in the name of Time Warner Cable using VoIP technology (PUCT, Docket No. 28303; *Application of Time Warner Cable Information Services (Texas), LP, D/B/A Time Warner Cable for a Service Provider Certificate of Operating Authority*). In the final PUCT Amended Notice of Approval (January 21, 2004), the PUCT ordered, and by accepting the certificate Time Warner agreed, to “establish an access line account and submit quarterly reports in compliance with House Bill 1777 [codified as Chapter 283 of the Local Government Code]” for its VoIP customers as “access lines” for purposes of compensation to municipalities (Time Warner did have a reservation of rights if the VoIP service where otherwise characterized by other law). In a subsequent request for similar certification by Cox Texas Telecom., LP., (“Cox”) using the

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facilities of an affiliate, Cox Cable, to provide local exchange service via VoIP, Cox agreed in the submitted application to compensate municipalities in conformity with the “access line” methodology. In the second sentence of the answer to the Application Question No. 11(a), Cox stated:

“As a Certificated Telecommunications Utility, Applicant will report its access lines in accordance with Chapter 283 of the Local Government Code and the Commission’s rules.” (PUCT, Docket No. 29348; *Application of Cox Texas Telecom., LP for a Service Provider Certificate of Operating Authority*.)

The characterization of VoIP service is of immense fiscal and regulatory importance to both the PUCT and to Texas municipalities, including those members of TCCFUI. TCCFUI agrees with the PUCT’s Order that these are access lines for purpose of Texas law, and as such are subject to state regulation which should not be preempted by the FCC.

### III. PUBLIC SAFETY - E 911 COMPLIANCE

PUCT Rule 26.111(c)(2)(E) (as to the issuance of a certificate for a CTP) requires that the local exchange provider be able to meet the “[PUCT] quality of service standards ... [which] shall include 911 compliance” in accordance with state law (*Texas Health and Safety Code*, Chapter 771 and 772). If the service is “data-only,” the lines are exempted from the 911 requirements under subsection (h) of that same rule – unless and until “voice service” is added. Under Texas law, it is not the transmission technology that determines the applicability of 911 compliance – but the *type* of transmissions - (*data-only vs. voice*). Citizens in Texas now trust that 911 capabilities will be available when they make a call, regardless of the *technology* used to *make* that call - VoIP or otherwise.

PUCT Rules 26.431 to 26.433 pertaining to 911 emergency services and funding must be strictly enforced as a matter of public safety and competitive neutrality. As stated in Rule 26.433: **“Purpose.** The provisions of this section are **intended to assure the integrity of the state’s emergency 9-1-1 system in the context of a competitive telecommunications market.**” (emphasis added). That “integrity” of the state’s emergency 911 system should not be skewed by the entrance into the competitive market by an “*exempted*” VoIP provider.

As to local 911 areas, the Texas legislature stated the following purpose for enactment of the statute (*Texas Health & Safety Code*, § 772.102), which is quoted in full:

**“Purpose.** It is the purpose of this subchapter to establish the number 9-1-1 as the primary emergency telephone number **for use by certain local governments in this state and to encourage units of local government and combinations of the units to develop and improve emergency communication procedures and facilities in a manner that makes possible the quick response to any person calling the telephone number 9-1-1 seeking police, fire, medical, rescue, and other emergency services.** To this purpose the legislature finds that:

(1) **it is in the public interest to shorten the time required for a citizen to request and receive emergency aid;**

(2) there exist thousands of different emergency telephone numbers throughout the state, and telephone exchange boundaries and central office service areas do not necessarily correspond to public safety and political boundaries;

(3) a dominant part of the state's population is located in rapidly expanding metropolitan areas that generally cross the boundary lines of local jurisdictions and often extend into two or more counties; and

**(4) provision of a single, primary three-digit emergency number through which emergency services can be quickly and efficiently obtained would provide a significant contribution to law enforcement and other public safety efforts by making it less difficult to notify public safety personnel quickly.”** (emphasis added).

PUCT Rule 26.272 (e)(1)(B)) provides in detail the “Minimum interconnection arrangements” as to E-911. VoIP providers should not be exempted from these minimal requirements by being characterized as something other than a “telecommunication service.”

TCCFUI agrees with the comments concerning compliance with state 911 requirements

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filed by both the “Texas Commission on State Emergency Communications and Texas Emergency Communications Districts,” and the “Washington Enhanced 911 Program” in the Vonage Declaratory Order matter<sup>4</sup>. The concern of the public using a telephone system which for years has had a ubiquitous 911 connection – and to now not require that same 911 connection if the service is provided via VoIP – would wholly undermine the years of confidence built into that 911 system. How will one know if a telephone is not 911 compliant? Do you ask before the emergency!!

Elimination of 911 interconnectivity is contrary to public policy and just plain dangerous. No governmental body should even seriously consider such an “exemption” for a telephone

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<sup>4</sup> *In the Matter of Vonage Holdings Corp Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No 03-211 (2003) (“Vonage FCC Declaratory Order proceeding”).

service that wants to compete in Texas or in the nation. This of course is in addition to the discriminatory regulatory treatment between competing providers as to the applicability of 911 rules. VoIP providers should not have a competitive regulatory advantage over other providers of local exchange services simply due to the technology used to deploy the service at the expense of the integrity of the state and local emergency 911 systems.

#### **IV. COMPETITIVE NEUTRALITY ISSUES**

##### **A. Competitively Neutral Contributions to the Universal Service Fund**

Under PUCT Rules as to the Texas Universal Service Fund obligations, PUCT Rules 26.401 to 26.420 must apply equally to all providers of local exchange services; otherwise VoIP providers will have a competitive regulatory advantage over other providers of local exchange services simply due to the technology used to deploy the service. The state and national goals of universal service must also be honored.

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##### **B. Competitively Neutral Compensation for Use of the Public Rights-of-Way**

As was noted earlier in these Comments, Texas municipalities are compensated for use of their rights-of-ways by CTPs, pursuant to state law and PUCT Rules based upon the number of “access lines.”<sup>5</sup> Any potential for discriminatory regulatory treatment between providers of local exchange services as to payment of “access line fees” must be eliminated; otherwise VoIP

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<sup>5</sup> It should also be noted that while the “access line” compensation methodology is relatively new, since 1999, it is the successor methodology to a value based percentage of gross receipts compensation for use of the rights-of-way which was paid to cities in Texas for decades. Prior to that it was assessed as a per pole fee. *Southwestern Tel. & Tel. V. City of Dallas*, 174 S.W. 636 (Tex. Civ. App. -1915, reh. den.). For a summary on how such municipal franchise fees have been viewed historically in Texas, see Texas Attorney General Opinion, H-1265 (Tex. A.G. Op. 1978).

providers will have a competitive regulatory advantage over other providers of local exchange services simply due to the technology used to deploy the service.

#### **V. VoIP IS “FUNCTIONALLY” A “TELECOMMUNICATION SERVICE”**

In a broader manner, TCCFUI would agree with the comments of the “National Association of State Utility Consumer Advocates,” which go into great detail regarding VoIP being a “telecommunication service”<sup>6</sup>. VoIP is used as a “telecommunication service” by consumers; and VoIP is marketed and functions as a “telecommunication service” by Vonage and other VoIP providers.

One of the rationales as to VoIP being an “information service” rather than a “telecommunication service” is that the data is “manipulated” and “changed” by the VoIP provider from an analogue signal to packets of data in order that it may be transmitted via the

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Internet. The Commission termed this “protocol processing,” even though the Commission has stated that, if there were no net change, protocol processing was not to affect the classification<sup>7</sup>. But this is exactly what is happening with VoIP. In VoIP there is “protocol processing” with no net change. The data is “manipulated” to travel via the Internet, but it is no consequence to the ultimate function or the consumer. No permanent change occurs in the data being sent. The manipulation of data only occurs in order to *use* the Internet as a means of sending the data.

The penultimate goal of the VoIP provider is to totally mimic a conventional telephone call. When a telephone call is made through VoIP, the voice goes in one end and it *must* sound exactly identical and in the same timeframe when it is received at the other end. VoIP is

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<sup>6</sup> As filed in the Vonage FCC Declaratory Order proceeding.

<sup>7</sup> In the Matter of Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501, 11526-27 (“1998 FCC Report to Congress” herein)

marketed to be exactly like the consumer's phone service: the consumer should not be able to perceive change in the "data," and it should sound the same and be time identical to a phone call. That is the goal of the VoIP provider – their "Holy Grail" if you will – to be indistinguishable from the conventional phone system. In fact, if there were a *perceptible* manipulation in the words, intonations or pauses in the telephone call, it would not be a service that many consumers would want.

It is a "telecommunication service" that is being purchased and not an "information service." It is not being purchased by the consumer so that sound (i.e. voice) can be manipulated and changed and be received at the other end sounding differently. It is purchased so that it will be identical to a phone call. Just because the technology requires a different formatting, it is no different than when a conventional telephone call changes the voice to an analog signal

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Otherwise, anything short of two connected Dixie cups would not be considered a "telecommunication service" because some type of manipulation or change in the data always occurs.

It has also been argued that the fact that a "call" can be stored for retrieval later makes it an "information service." How is this functioning any differently from conventional voice mail? A call is stored and retrieved later. Yet just because an ILEC has "call notes" does not make the service an "information service." As the Commission has stated, function is to control the classification, not the type of the facility used. In the case of VoIP, the "facility" is a computer and/or use of the Internet.<sup>8</sup>

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<sup>8</sup> 1998 *FCC Report to Congress*, at 11530, para. 59 ("the classification of a provider should not depend on the type of facility used").



## **VI. FEDERAL COMMUNICATIONS COMMISSION (“FCC”) COMMENTS AS TO VOIP IN THIS NOTICE AS TO IP-ENABLED SERVICES<sup>9</sup>**

The Federal Communications Commission (“FCC”) itself in this Notice of Proposed Rulemaking (“NPRM”) comments on several of the VoIP issues that may be raised in this proceeding. Significantly, several times in the FCC NPRM it both notes the potential growth in VoIP and the fact that VoIP, which utilizes the public switched telephone network (“PSTN”), should incur similar obligations as others that use the PSTN. Specifically, the NPRM provides that “more and more businesses are moving to VoIP solutions in lieu of PBXs and other traditional facilities to manage their communications.”<sup>10</sup> Additionally, it notes that “Time Warner cable predicts that it will offer IP telephony to all of its subscribers by the end of 2004.”<sup>11</sup> The report also indicates that AT&T has stated that it will “provide VoIP service in 100 markets by the first quarter of 2004 and expects to enroll over one million customers in the next two years.”<sup>12</sup>

The NPRM in a footnote adds that “[t]he increase in the number of voice calls transmitted over at least a portion of an IP network over the past few years has been dramatic.”<sup>13</sup>

As to VoIP obligations, the FCC notes, “As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable

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<sup>9</sup> *FCC Notice of Proposed Rulemaking*, WC Docket No. 04-36, (adopted February 12, 2004; released March 10, 2004).

<sup>10</sup> *Id.*, n.6.

<sup>11</sup> *Id.*, ¶ 12.

<sup>12</sup> *Id.*, ¶ 13.

<sup>13</sup> *Id.*, n.34.

network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.”<sup>14</sup>

In a reference to interexchange access charges, the FCC states again that “[a]s a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”<sup>15</sup> Additionally, several FCC Commissioners’ comments mention interconnection with the PSTN and its obligations. Chairman Powell states “the NPRM considers distinguishing service providers that offer interconnection with the nation’s public switched telephone network from those that do not.” Additionally, Commissioner Martin alludes to the same concept when he states, “The NPRM acknowledges that VoIP offerings, at times, may or may not need to use the public switched network (“PSTN”) and ask how we should take their key distinctions into account. The item also makes clear that **functionally equivalent services should be subject to similar obligations** and that the cost of the PSTN should be borne equitably among those that use it in similar ways.”(emphasis added)

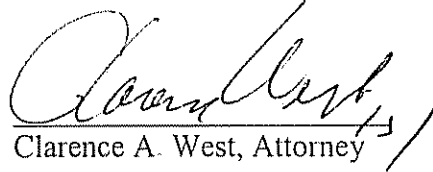
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<sup>14</sup> *Id.*, ¶ 33 (emphasis added).

<sup>15</sup> *Id.*, ¶ 61. Note that this language is identical to the language from paragraph 33.

While most of this discussion was in the context of interexchange access charges between carriers, because that is where the FCC plays a large role, the same concept of functionally equivalent services bearing an equal obligation should be applied with regard to access line fee charges in Texas.

Respectfully submitted,



Clarence A. West, Attorney

Clarence A. West  
TBN 21196300  
1201 Rio Grande, Suite 200  
Austin, Texas 78701  
Telephone: (512) 499-8838  
Facsimile: (512) 322-0884  
Email: cawest@cawestlaw.com

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Attorney for TCCFUI